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3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

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6 ROBERT MORRIE HAYES,

Case No. 3:20-cv-00631-MMD-WGC

7 Petitioner,

ORDER

8 v.

9 KYLE OLSEN, WARDEN, *et al.*,

10 Respondents.

11  
12 Robert Morrie Hayes' 28 U.S.C. § 2254 habeas corpus petition is before the Court  
13 on respondents' motion to dismiss certain grounds as unexhausted and/or non-  
14 cognizable. (ECF No. 13.) As discussed below, the motion is denied.

15 **I. PROCEDURAL HISTORY AND BACKGROUND**

16 In August 2016, a jury found Hayes guilty of four counts of sexual assault with a  
17 minor under fourteen years of age and six counts of lewdness with a child under fourteen  
18 years of age (Exhibit ("Exh.") 39 at 28-31).<sup>1</sup> The state district court sentenced him to an  
19 aggregate of 40 years to life. (Exh. 41.) Judgment of conviction was entered on October  
20 14, 2016. (Exh. 42.)

21 The Nevada Court of Appeals affirmed Hayes' conviction in September 2017. (Exh.  
22 57.) The state district court conducted an evidentiary hearing on Hayes' state  
23 postconviction habeas corpus petition and subsequently denied the petition. (Exhs. 68,  
24 73.) The Nevada Supreme Court affirmed the denial of the petition in July 2020. (Exh.  
25 84.)

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28 <sup>1</sup>The exhibits referenced in this order are exhibits to Respondents' motion to  
dismiss, ECF No. 13, and are found at ECF Nos. 10-12.

1 Hayes filed his federal petition on November 12, 2020. (ECF No. 1.) Respondents  
 2 now move to dismiss certain grounds as unexhausted and/or non-cognizable. (ECF No.  
 3 13.) Hayes opposed (ECF No. 16), and Respondents replied (ECF No. 20).

4 **II. DISCUSSION**

5 **a. Exhaustion – Ground 1**

6 A federal court will not grant a state prisoner's petition for habeas relief until the  
 7 prisoner has exhausted his available state remedies for all claims raised. See *Rose v.*  
 8 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts  
 9 a fair opportunity to act on each of his claims before he presents those claims in a federal  
 10 habeas petition. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also *Duncan*  
 11 *v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has  
 12 given the highest available state court the opportunity to consider the claim through direct  
 13 appeal or state collateral review proceedings. See *Casey v. Moore*, 386 F.3d 896, 916  
 14 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

15 A habeas petitioner must "present the state courts with the same claim he urges  
 16 upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal  
 17 constitutional implications of a claim, not just issues of state law, must have been raised  
 18 in the state court to achieve exhaustion. See *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481  
 19 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court  
 20 must be "alerted to the fact that the prisoner [is] asserting claims under the United States  
 21 Constitution" and given the opportunity to correct alleged violations of the prisoner's  
 22 federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see also *Hiivala v. Wood*, 195  
 23 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) "provides a  
 24 simple and clear instruction to potential litigants: before you bring any claims to federal  
 25 court, be sure that you first have taken each one to state court." *Jiminez v. Rice*, 276 F.3d  
 26 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)). "[G]eneral  
 27 appeals to broad constitutional principles, such as due process, equal protection, and the  
 28 right to a fair trial, are insufficient to establish exhaustion." *Hiivala*, 195 F.3d at 1106.

1 However, citation to state case law that applies federal constitutional principles will  
2 suffice. See *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

3 A claim is not exhausted unless the petitioner has presented to the state court the  
4 same operative facts and legal theory upon which his federal habeas claim is based. See  
5 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The  
6 exhaustion requirement is not met when the petitioner presents to the federal court facts  
7 or evidence which place the claim in a significantly different posture than it was in the  
8 state courts, or where different facts are presented at the federal level to support the same  
9 theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*  
10 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458  
11 (D. Nev. 1984).

12 Respondents have moved to dismiss part of ground 1 as unexhausted. (ECF No.  
13 at 3-6.) In ground 1, Hayes asserts that his trial counsel was ineffective for failing to  
14 conduct an adequate pretrial investigation, failing to request an independent  
15 psychological examination of the victim, and failing to present expert testimony in violation  
16 of his Sixth and Fourteenth Amendment rights. (ECF No. 1 at 17-28.) Respondents have  
17 divided the claim into (A), (B) and (C). They argue that ground 1(A), the claim that counsel  
18 was ineffective for failing to conduct an adequate pretrial investigation, is unexhausted.  
19 (ECF No. 13 at 5.)

20 Respondents parse out federal ground 1 too finely. Hayes states that he “received  
21 ineffective assistance of trial counsel for counsel’s failure to conduct an adequate pretrial  
22 investigation. Specifically, trial counsel failed to request and obtain an independent  
23 psychological evaluation of A.G. as well as failed to present testimony of an expert  
24 regarding the state of mind of A.G., to include psychological motivations behind the  
25 fabrication of events[.]” (ECF No. 1 at 17.) Thus, ground 1 really argues that trial counsel  
26 was ineffective for failing to do two things: obtain a psychological evaluation and present  
27 expert testimony. Hayes presented these claims to the Nevada Supreme Court on appeal  
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1 of the denial of his state postconviction habeas petition. (Exhs. 81, 84.) The Court,  
 2 therefore, finds that the entirety of ground 1 is exhausted.

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4           **b. Claims Cognizable in Federal Habeas Corpus (state law claims) –  
                         Ground 2**

5           A state prisoner is entitled to federal habeas relief only if he is being held in custody  
 6 in violation of the constitution, laws or treaties of the United States. See 28 U.S.C. §  
 7 2254(a). Alleged errors in the interpretation or application of state law do not warrant  
 8 habeas relief. See *Hubbart v. Knapp*, 379 F.3d 773, 779-80 (9th Cir. 2004); see also  
 9 *Jackson v. Ylst*, 921 F.2d 882, 885 (9th Cir. 1990) (“noting that [the federal court] ha[s]  
 10 no authority to review a state’s application of its own laws”).

11           Hayes contends that his Fourteenth Amendment due process rights were violated  
 12 when the district court imposed consecutive sentences “in the absence of preexistent,  
 13 cognizable and reviewable standards and criteria permitting its imposition[.]” (ECF No. 1  
 14 at 28-37.)

15           NRS § 176.035(1) provides that whenever a person is convicted of two or more  
 16 offenses, the court “may” run the sentences concurrently or consecutively (emphasis  
 17 added). Hayes points to several other states that require consideration of specific criteria  
 18 before sentencing a defendant to consecutive terms. (ECF No. 1 at 32-34.) He argues  
 19 that under *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the lack of preexistent and reviewable  
 20 criteria violates his due process rights (ECF No. 1 at 37).

21           The Nevada Court of Appeals explicitly analyzed whether the statute violates  
 22 federal due process when it rejected this claim on direct appeal. (Exh. 57.) Therefore, the  
 23 Court declines to dismiss ground 2 as a purely state law claim.

24           **III. CONCLUSION**

25           It is therefore ordered that Respondents’ motion to dismiss (ECF No. 13) is denied.

26           It is further ordered that Respondents have 60 days from the date of this order in  
 27 which to file an answer to Petitioner’s remaining grounds for relief. The answer must  
 28 contain all substantive and procedural arguments as to all surviving grounds of the

1 petition and comply with Rule 5 of the Rules Governing Proceedings in the United States  
2 District Courts under 28 U.S.C. §2254.

3 It is further ordered that Petitioner will have 45 days following service of  
4 Respondents' answer in which to file a reply.

5 It is further ordered that Respondents' first, second, and third motions for extension  
6 of time to file a reply in support of the motion to dismiss (ECF Nos. 17, 18, and 19) are all  
7 granted *nunc pro tunc*.

8 DATED THIS 25<sup>th</sup> Day of January 2022.



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10 MIRANDA M. DU, CHIEF JUDGE  
11 UNITED STATES DISTRICT COURT  
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